86-37

No.

Supreme Court, U.S.
FILED
JUL 14 1986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. HECHENBERGER,

Petitioner,

vs.

WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. DOES PLAN PARTICIPANT PREVIOUSLY WILFULLY THREATENED WITH LOSS OF BENEFITS, HAVE STANDING UNDER ERISA SECTION 502(a) TO SEEK NON-MONETARY REMEDIES SUCH AS REMOVAL OF FIDUCIARY FOR PRIOR UNCORRECTED BENEFIT LOSSES SYSTEMATICALLY CAUSED TO HUNDREDS OF OTHER PLAN BENEFICIARIES, AND FOR FIDUCIARY DECEIT IN PLAN CONSTRUCTION?

2. DID DISTRICT COURT ABUSE DISCRETION TO FORFEIT ALL COSTS AND FEES TO THREATENED ERISA PARTICIPANT WHOSE COSTLY ACTION LED TO EMPLOYER/FIDUCIARY'S ANNOUNCED ABANDONMENT OF PERVASIVE PRACTICE OF WILFULLY THREATENING AND EFFECTING BENEFITS REDUCTIONS, MERELY BECAUSE PARTICIPANT IS NOT SUCCESSFUL ON APPEAL SEEKING BROADER REMEDIES OF FIDUCIARY REMOVAL, CORRECTION FOR OTHER BENEFICIARIES ADVERSELY AFFECTED AND EXTRA-CONTRACTUAL DAMAGES?

3. WHAT ARE THE STANDARDS AND FACTORS FOR DETERMINING FEES IN AN ACTION BROUGHT BY PREVAILING ERISA PARTICPANTS UNDER 29 U.S.C. §1132(g)(1), AND SHOULD THE DISTRICT COURT BE REQUIRED TO CONDUCT A FACTORED ANALYSIS SIMILAR TO THAT REQUIRED IN *HENSLEY V. ECKERHART,* 461 U.S. 424 (1983) OR THAT ADOPTED BY OTHER CIRCUITS FOR ERISA CASES?

LIST OF PARTIES TO THE PROCEEDINGS

All parties are fully listed in the caption. Petitioner Hechenberger is a Missouri employee of Western Electric Company, now renamed AT&T Technologies, Inc., and by reason of his employment was a participant in the respondent Western Electric Plan, an ERISA benefits plans covering employees in many states.

There were other parties below. William V. Wilken and Charles W. Ramsey, also appellants below and employed by Southwestern Bell Telephone Company, are not parties to this petition. Their employer and its plan, appellees below, fully abandoned as they represented and later made correction wherever they had discriminated, albeit only after the first appeal was taken and only as a result of much later instituted litigation. Intervenor, the Director of the Division of Workers Compensation, State of Missouri, also an appellee below, is not a party since petitioner's claim, unlike that of the other appellants below, is based on respondents' conduct in more than a single state.

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No.

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OCTOBER TERM, 1985

RICHARD A. HECHENBERGER,

Petitioner,

VS.

WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The opinion of the three-judge panel of the Eighth Circuit Court of Appeals in this proceeding is reported at 786 F.2d 347. It is printed in Appendix A hereto, infra, pages A-1 through A-4. The order of the court denying petitioners' Petition for Rehearing and for Rehearing En Banc is printed in Appendix B hereto, infra page A-5.

The district court decision from which appeal was taken reported at 599 F.Supp. 688. It is printed in Appendix C hereto, infra pages A-6 through A-8.

There was an earlier appellate decision in this case, 742 F.2d 453, printed in Appendix D hereto, infra pages A-9 through A-13. This Court denied a petition to review that prior decision. ____ U.S. ____, 105 S.Ct. 1182, 84 L.Ed.2d 330. The district court decision giving rise to that first appeal between the parties hereto is reported at 570 F.Supp. 820, reprinted herein in Appendix E, infra pages A-14 through A-19.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eighth Circuit was entered March 11, 1986. A timely petition for rehearing or rehearing en banc was denied on April 24, 1986. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are Sections 2(b), 404(a)(1)(A)(i) and (D), 406(a)(1)(D) and (b)(2), 502(a)(1)(B) and (3), and 502(g)(1) and 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001, 1104, 1106, 1132 and 1144. The principal ERISA section relied upon, Section 502, reads in pertinent part

> (a) A civil action may be brought—
>
> (1) By a participant or beneficiary—
>
> (B) ... to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; ...
>
> (3) By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provi-

> sion of this subchapter or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; ...
>
> (g)(1) In any action under this subchapter ... by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

The balance of the ERISA provisions are printed in Appendix F, infra pages A-20 through A-21. The rules referred to in note 3 infra are also printed in Appendix F, page A-22.

STATEMENT OF CASE

Shortly following the enactment of ERISA the respondents who unilaterally administered the benefit plan, wilfully commenced the pervasive practice of violating the terms of such 50-state benefit plan by integrating plan benefits for absences due to physical disability, with worker's compensation payments for residual disability, in only three states, Missouri, New York and Colorado. The national plan did not allow such integration but to petitioner, respondents deceitfully insisted it did. The effect of this three-state systematic practice was to reduce benefits for workers injured in those states, saving respondent employer hundreds of thousands of dollars.

Petitioner, a plan participant injured while at work in Missouri, was threatened with such "integration." Petitioner sued under ERISA Section 502, 29 U.S.C. §1132. By the time of dismissal he sought (1) class action status to protect all participants and beneficiaries in all three states, (2) cessation of the practice, (3) removal of the plan fiduciaries, (4) correction for beneficiaries who had already suffered reduction in all three states, (5) extra-contractual damages, and (6) costs and fees. After a year and a half of contest and an extensive discovery costing petitioner thousands of dollars, and shortly after the

district court had scheduled class hearing and trial dates and a month before respondents learned of any change in Missouri law, respondents announced they were abandoning the practice in Missouri and represented they had previously abandoned the pervasive practice in the other two states because of petitioner's action. In announcing abandonment respondents did not propose to make correction for those who previously suffered reductions; respondents insisted the fiduciary could still reinterpret the plan at any time to lessen benefits and reduce the employer's costs. The district court dismissed the case as moot and said it would refuse petitioner any fees.

Petitioner appealed the summary judgment dismissal. A panel of the Eighth Circuit (first panel) did not address various remedy issues petitioner raised and extensively briefed on appeal, including those of removal of the fiduciary and extra-contractual damages. It affirmed the mootness ruling because of abandonment of the threat, but the panel suggested in a footnote that petitioner raise his fee issue again in the district court. Petitioner did so.

While essentially conceding petitioner was prevailing party, on such remand the district court denied both costs and fees primarily because petitioner had earlier appealed ("continued to litigate"). No analysis was performed using the analytical framework of this Court's decision in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), or the five factors most circuits have adopted, infra p. 12. Petitioner appealed.

On appeal another panel of the Eighth Circuit (second panel) held petitioner was required to accept respondents' claims of abandonment as true even though on rehearing petitioner offered newly discovered, uncontradicted documentary evidence that respondents had not totally abandoned the practice as they had previously represented. The second panel held petitioner as plan participant had obtained the fullest extent of relief to which he was entitled by the withdrawal of the threat. The se-

cond panel essentially held that petitioner, once the threat was removed, had no standing under ERISA — in fact had been "basically frivolous" — to have pursued on appeal claims for removal of plan fiduciaries or to seek correction for others who had already suffered loss of benefits, or to seek extra-contractual damages. The second panel concluded it was permissible under ERISA Section 502(g) for the district court to cause a forfeiture of *all* costs and fees for the first appeal taken by petitioner; the first appeal was a "special circumstance" justifying disregard of a *Hensley*-type analysis.

JURISDICTION OF FEDERAL COURT

The jurisdiction of the federal court was invoked pursuant to 29 U.S.C. §§185(a) and 1132(a). (Section 502 of ERISA and Section 301 of the NLRA.)

REASONS FOR ALLOWANCE OF THE WRIT

The decisions below will dissuade those protected by ERISA from taking appeals seeking broader attorney-general type remedies, if by appealing they risk forfeiture of all costs and fees as prevailing parties below. An appeal should not be a special circumstance to disallow all costs and fees.

This Court has only recently addressed the question of standing, albeit under a somewhat different law. *International Union, UAW v. Brock,* No. 84-1777, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____, 54 Law Week 4764 (1986). Questions concerning fees and costs for those Congress intended to protect and the concern of this Court that there be incentives to assure attorneys are willing to take such cases, have also been a significant issue for this Court. E.g., *City of Riverside v. Rivera,* No. 85-224, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____, 54 Law Week 4845 (1986); *Hensley v. Eckerhart,* 461 U.S. 424 (1983); *Blum v. Stetson,* 465 U.S. 886 (1984); *Maher v. Gagne,* 448 U.S. 122 (1980); *Marek v. Chesney,* 473 U.S. ____, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985); *Evans v. Jeff D.,* 475 U.S. ____, 106 S.Ct. ____, 89 L.Ed.2d 747 (1986); *Hewitt v. Helms,* No. 85-1630, ____ S.Ct. ____, 54 Law Week 3819 (1986) (certiorari granted). Even in *Mass. Mutual Life Ins. Co. v. Russell,* ____ U.S. ____, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), an ERISA case, the majority acknowledged a possible fee concern to assure that victims enjoy access. 87 L.Ed.2d at 106. In ERISA cases fees are required to meet Congressional desire for "ready access" under 29 U.S.C. §1001(b). *Smith v. CMTA-IAM Pension Trust,* 746 F.2d 587 (9th Cir. 1984). Congress did not require that the protected ERISA claimant prevail as it did for Civil Rights cases.[1]

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[1] See *Miles v. The New York State Teamsters Conference Pension and Retirement Fund,* 698 F.2d 593, 602 (2d Cir. 1983), cert den'd 464 U.S. 829 (1983). ("Success on the merits is not, in theory, indispensible to the award of attorney's fees ...") In contrast the Civil Rights statutes require the claimant to have prevailed. Compare 29 U.S.C. §1132(g)(1) with 42 U.S.C. §1988.

While the last two questions presented for review are posed in fee terms, they also raise questions of standing under ERISA §502(a), 29 U.S.C. §1132(a) and what remedies are appropriate under subsections (1) and (3) of that ERISA subsection (a), the very question left unanswered in *Mass. Mutual Life Ins. Co. v. Russell, supra,* because Ms. Russell eschewed relief under either of those subsections.

The Eighth Circuit proceeds on the supposition that if ERISA participants use the courts to the point of appeal, to seek more extensive relief than assurance of monetary benefits under the plan for themselves, or seek to help their injured fellow workers after they themselves and supposedly future claimants are no longer threatened with benefit losses, then they have gone too far — are "basically frivolous." The Eighth Circuit allows the district court to condemn and punish petitioner for attempting to act as a "private attorney general," and denies all incentive to the threatened victim's counsel to seek more than cessation of the wrongful conduct as it affects petitioner. However Congress in describing the parties to ERISA litigation, Section 502(a), 29 U.S.C. §1132(a), did not segregate and distinguish participants from beneficiaries. Nor did sub-subsection (3)(B) limit petitioner as a participant from seeking the broad range of remedies Congress set out ("redress such violations," "enforce any provisions of this subchapter or the terms of the plan"). Apart from ERISA and this Court's recent decision in *International Union, UAW v. Brock, supra,* substantive federal labor law recognizes that employees usually act concertedly.[2]

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[2] E.g., *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *JMC Transport, Inc. v. NLRB*, 776 F.2d 612 (6th Cir. 1985); *Prill v. NLRB*, 755 F.2d 241 (DC Cir. 1985); *Ewing v. NLRB*, 768 F.2d 51 (2d Cir. 1985).

By labeling "basically frivolous" petitioner's first appeal over remedies, fees and costs,[3] the second panel of the Eighth Circuit apparently rejected that this Honorable Court in *Mass. Mutual Life Ins. Co. v. Russell, supra,* 87 L.Ed.2d at 106, meant to suggest a participant who ultimately got her full benefit a few days late but before suit, might still seek removal of the fiduciary.[4] Asking on appeal for removal of the fiduciary for a willful and discriminatory practice in violation of plan terms, carried out systematically for almost ten years in three states, victimizing injured workers who were denied hundreds of thousands of dollars, is not frivolous. Had the fiduciaries been replaced as petitioner sought on his first appeal, properly acting fiduciaries would have likely instituted corrections for those hundreds previously injured by the pervasive practice. Injured workers in two of the three states still suffer their earlier benefit

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[3] The second panel did not even read the arguments in the first appeal, creating due process issues. The first panel did not suggest the petitioner's first appeal was frivolous and however "cursory" the second panel viewed the "fashion" of the first panel's decision, on his first appeal the Eighth Circuit imposed no sanctions under Rule 38, FRCP, nor did it impose sanctions under 8th Cir.R. 16(e) when petitioner on the first appeal sought rehearing or rehearing en banc.

Notwithstanding the second panel's finding the first appeal was "basically frivolous," when respondents expressly asked the appellate court's second panel to impose even modest sanctions against petitioner because of his appeals, the Eighth Circuit denied respondents' request! Respondents were allowed no costs on petitioner's second appeal. Neither appeal was frivolous.

[4] The Chief Justice stated: "If the plan administrator's refusal to pay contractually-authorized benefits had been willful and part of a systematic breach of fiduciary obligations, respondent in this hypothetical could have asked for removal of the fiduciary ..." 87 L.Ed.2d at 106.

loss.[5] One need only read respondents' summary judgment materials to recognize the fiduciaries that petitioner still must suffer with, remain committed to seeking ways to benefit the employer, an adverse party, at the expense of participants and beneficiaries, in violation of ERISA Sections 404 and 406, 29 U.S.C. §§1104, 1106. Petitioner should be entitled to more than this. See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

Review is warranted for further reasons. Unless the first appeal was a "special circumstance," the considerations identified in *Hensley v. Eckerhart, supra,* have not been followed in this ERISA action. The district court used a vague "unjust" standard that allowed the *Hensley* considerations to be ignored. The district court was allowed to exclude success of the threatened participants in forcing abandonment announcement and the liability concession the second panel viewed the abandonment announcement to mean. If an appeal for broader remedies is lost by the prevailing party, then according to the Eighth Circuit, the district court can metamorphose successful victim into "loser" to assure the victim forfeits all costs and fees. At least in *Burlington Northern RR v. Woods,* 768 F.2d 1287 (11th Cir. 1985), cert granted No. 85-1088, 106 S.Ct. 1456 (1986), the cost to the party losing on appeal is only a ten percent punishment.

To allow loss of an appeal on remedy issues to serve as reason for a total forfeiture of fees and costs inhibits ERISA-protected individuals from appellate access, certainly a cherished value in our society. In *Talamini v. Allstate Ins. Co.*, ____ U.S. ____,

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[5] Both the district court and the Eighth Circuit encourage multiplicity of litigation if respondents are to be judicially compelled by separate actions in each of the three states, to make correction for their past misconduct. The Eighth Circuit would only discuss the case in terms of Missouri law notwithstanding ERISA Section 514, 29 U.S.C. §1144. Before the first district court dismissal petitioner had discovered and was complaining about respondents' pervasive conduct in all three states. There is no reason that plan participants in each state sue separately for correction under a single multistate plan prohibiting integration. Cf. *Allis-Chalmers v. Lueck,* 471 U.S. ____, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 105 n.25 (1983).

105 S.Ct. 1824, 1827-1828, 85 L.Ed.2d 125, 129-30, (1985), Justice Stevens said

> "Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principle of open access."

The petitioner in *Burlington Northern RR v. Woods, supra,* addresses the appellate-access issue at pages 26-27 of its brief to this Honorable Court.

Petitioner's further request on the first appeal for extra-contractual damages could not then have been frivolous, for at the time this Court had not yet announced decision in *Mass. Mutual Life Ins. Co. v. Russell, supra.*[6] In *Mass. Mutual Life*

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[6] Petitioner sought interest for the delay in payments caused by respondents in resisting liability for a year and a half before abandonment. Petitioner also sought an amount equal to attorneys fees he had to pay in his separate state action for worker's compensation; absent the integration threat, he neither needed nor would he have retained counsel in the state proceeding. The second panel erred to say petitioner sought no damages; what the court likely meant was that since petitioner had not yet lost benefits by the threat, under ERISA he sought no benefits as damages.

Petitioner also sought punitive damages, since respondent's conduct was willful and pervasive. Hundreds of injured workers had been denied hundreds of thousands of dollars in benefits. We're not talking about only a few-day delay in payment to a single beneficiary as was true in Ms Russell's case.

Ins. Co. v. Russell, supra, this Court later stated it left open the propriety of extra-contractual damages under ERISA Section 502(a)(1) and (3). This Court restricted itself expressly to extra-contractual damages Ms Russell sought under subsection (*2*). Petitioner proceeds under subsections (1) and (3).

Even if petitioner's first appeal was "basically frivolous" because he sought broad remedies not cured by respondents' announced abandonment of future threats to integrate, this Court in *Evans v. Jeff D., supra,* made it almost an art form for a statutorily-protected claimant to always ask for more relief than likely to be given, to enhance settlement prospects. Although petitioner submits each remedy request he made he intended to fully pursue, the petition for certiorari raises the question whether the Eighth Circuit opinion is consistent with this Court's views on remedy requests as they affect fees, as set out in *Evans v. Jeff D., supra.*

The Eighth Circuit opinion raises another important issue for review: Was it frivolous for employees who are on the "front line" of grievances day-in and day-out with their employer, to question (by appealing) their employer's representations that it had abandoned in all three states? Respondent employer hardly enjoys an unblemished record of fair dealing with its employees. E.g., *Kyriazi v. Western Electric Co.,* 461 F.Supp. 894, 914-17 (DC NJ 1978); *Bruno v. Western Electric Co.,* 618 F.Supp. 398 (D Colo. 1985). The record suggests some deceit.[7] Petitioner offered on appeal later-discovered documentary evidence, never denied or rebutted by respondents, that respondents had not fully abandoned as they had previously represented to the courts. This later-discovered evidence fulfilled petitioner's real fear that respondents would continue or return to their old ways

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[7] Apart from respondents' misrepresentation to participants of plan meaning, respondents initially denied in discovery the wrongful practice in any state other than Missouri; only later did they acknowledge the full extent of the practice.

since violation would not be easily discoverable. See *Chicago Teachers Union v. Hudson,* 475 U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232, 246 (1986).

The decision of the Eighth Circuit with respect to the standard to be applied to determine fees and costs in ERISA cases, is also in conflict with the five factor analysis adopted by other circuits. Those five factors are (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys fees; (3) whether an award of attorneys fees against the opposing parties could deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. E.g., *Smith v. CMTA-IAM Pension Trust, supra; Tenneco, Inc. v. First Virginia Bank,* 698 F.2d 688 (4th Cir. 1983); *Marquardt v. North American Car Corp.,* 642 F.2d 715 (7th Cir. 1981); *Eaves v. Penn,* 587 F.2d 453 (10th Cir. 1978), *Evans v. Bexley,* 750 F.2d 1498 (11th Cir. 1985); *Miles v. The New York State Teamsters Conference Pension and Retirement Fund, supra,* 698 F.2d at 602. The district court's and the Eighth Circuit's mandate that plan participants consider only their own monetary accomplishments in deciding to appeal, is totally inconsistent with the fourth factor that demands the interests and effect on others be duly considered and protected. The fourth factor is affirmation that plan participants can act as "private attorneys general."

CONCLUSION

Most workers cannot afford to retain and pay counsel out of their own pockets for the kind of protracted litigation required in the instant case. Thousands of dollars in costs, now held forfeited, had to be spent by the instant petitioner for discovery. Petitioner submits, paraphrasing this Court in *Hall v. Cole,* 412 U.S. 1, 13 (1973), that

> "Not to award counsel fees [and costs] in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual [participant/beneficiaries] to stand up and fight those who are in charge. ... An individual [participant/beneficiary] could not carry such a heavy financial burden. Without counsel fees [and costs] the grant of federal jurisdiction is but a gesture for few [participant/beneficiaries] could avail themselves of it."

For the foregoing reasons, it is respectfully submitted the Court grant the petition, or remand for express analysis consistent with prior decisions of this Court in *Hensley v. Eckerhardt, supra,* and *City of Riverside v. Rivera, supra.*

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1034

Richard A. Hechenberger,
Appellant,

William V. Wilken; Charles W. Ramsey,
Appellants,

vs.

Western Electric Co., Inc.; Western Electric Plan for Employees' Pensions, Disability Benefits and Death Benefits, now also known in part as Western Electric Sickness and Accident Disability Benefit Plan, Western Electric Co., Inc., Plan Administrator,
Appellees,

Southwestern Bell Telephone Co., Inc., Southwestern Bell Telephone Plan for Employees' Pensions, Disability Benefits and Death Benefits, now also known in part as Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan, Southwestern Bell Telephone Co., Plan Administrator,
Appellees,

vs.

Richard Rousselot, Director, Division of Workers Compensation, State of Missouri,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: November 14, 1985
Filed: March 11, 1986

Before LAY, Chief Judge, and HEANEY and FAGG, Circuit Judges.

PER CURIAM.

Richard A. Hechenberger, William V. Wilken, and Charles W. Ramsey (appellants) appeal the district court's denial of their request for costs and attorneys' fees (collectively fees or attorneys' fees) in an action brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(g). We affirm.

The appellants instituted this action against their employers, Western Electric Company and Southwestern Bell Telephone Company (employers), and their employers' disability benefit plans. In their action the appellants challenged the employers' practice of claiming a credit for amounts paid to employees under the disability plans against the employees' workers' compensation awards. At the time the lawsuit was filed, this practice was permitted under Missouri law. *See* Mo. Ann. Stat. § 287.160.3 (Vernon 1965) (repealed 1983).

The appellants claimed that this credit practice violated ERISA because it was not permitted under the employers' plans. The appellants further claimed that to the extent Missouri law permitted or required the employers to claim a credit in violation of their plans, the law was preempted by ERISA. Significantly, although the appellants had suffered injuries and had been compensated under their employers' plans, they had never been formally subjected to the challenged credit practice and hence did not seek actual damages.

Before trial, a combination of events, occurring at approximately the same time, made a judgment on the merits of the case unnecessary. First, the Missouri legislature amended the statute to disallow the credit practice. Mo. Ann. Stat. § 287.160.3 (Vernon 1986 Supp.). Second, although the amendment applied only to cases in which the injury occurred after the effective date of the statute, and thus did not affect the appellants' cases, *see Evans v. Missouri Utilities Co.*, 671 S.W.2d 812, 815 (Mo. App. 1984), the employers decided to abandon the credit practice altogether. The employers then filed motions for summary judgment.

Due to the employers' abandonment, the district court granted their motions for summary judgment finding that a live controversy no longer existed between the parties. *See Wilken v. Southwestern Bell Telephone Co.*, 573 F. Supp. 71 (E.D. Mo. 1983); *Hechenberger v. Western Electric Co.*, 570 F. Supp. 820 (E.D. Mo. 1983).

Despite their knowledge that the employers would not claim a credit in any outstanding or future workers' compensation case, the appellants appealed the district court's grant of summary judgment. This court in cursory fashion rejected their appeal on the grounds of mootness. *Hechenberger v. Western Electric Co.*, 742 F.2d 453 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 1182 (1985). Following this court's decision, the appellants returned to the district court with their request for attorneys' fees.

If the appellants prevailed in their ERISA action, they are entitled to attorneys' fees unless special circumstances exist that would render an award of fees unjust. *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980). However, a district court's determination regarding fees under ERISA will be reversed "only upon an abuse of discretion, which we will not find unless the record clearly supports such a conclusion." *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567, 576 (8th Cir. 1984).

Here, the district court assumed "arguendo" that the appellants prevailed to some extent but denied their request for fees because it found that under the special circumstances of the case an award would not be just. *Hechenberger v. Western Electric Co.*, 599 F. Supp. 688, 689 (E.D. Mo. 1984). The district court's decision was based in part on the appellants' appeal from the grants of summary judgment. *Id.*

In their briefs the appellants state that they will not request fees for the prior unsuccessful appeal. However, their concession ignores entirely the burden and expense the appellants subjected the employers to by requiring them to respond to the appellants' basically frivolous appeal. By appealing the grants of summary judgment, the appellants continued to challenge a practice that not only had been abandoned before trial but had never been formally applied to them. A reversal by this court would have forced them to litigate a matter already effectively resolved in their favor.

Our review of the record as a whole leads us to the conclusion that under the particular circumstances of this case the district court's denial of fees did not constitute a clear abuse of discretion. Due to our resolution of this issue, we need not address the appellants' other contentions on appeal. Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1034-EM

Richard A. Hechenberger, et al.,
Appellants,

vs.

Western Electric Co., Inc., et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

April 24, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

Richard A. Hechenberger, et al.,
Plaintiffs,

vs.

Western Electric Co., Inc., etc., et al.,
Defendants.

MEMORANDUM

(Filed December 4, 1984)

This matter is before the Court on plaintiffs' application for attorneys' fees and costs. Plaintiffs' complaint was dismissed as moot on October 17, 1983, and the dismissal was affirmed on August 24, 1984, following plaintiffs' appeal. The United States Court of Appeals for the Eighth Circuit noted in its opinion that any request for fees under 29 U.S.C. § 1132 "should be presented to the district court in the form of a fee request; it does not save the case from mootness." *Hechenberger v. Western Electric Co.,* No. 83-2266, slip op. at 5 n.5 (8th Cir. Aug. 28, 1984).

Plaintiffs' complaint arose under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132. Plaintiffs challenged the propriety of defendants' practice of integrating payments under an employee welfare benefit plan with certain payments made undernthe Missouri Workers Compensation Law, Mo. Rev. Stat. §§ 287.010, et seq. Defendants abandoned the integration or offsetting practice in June of 1983, and the case became moot since none of the named plaintiffs had been or would be subjected to an offset.

Despite the claims' mootness, plaintiffs persisted in opposing dismissal, to the point of appealing the dismissal. In seeking attorneys' fees, plaintiffs nonetheless assert they are the prevailing party. Under 29 U.S.C. § 1132, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The Eighth Circuit has interpreted § 1132 to mean prevailing plaintiffs should ordinarily recover fees unless such an award would be unjust due to special circumstances. *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980). The burden of proving special circumstances is on the losing defendant. *Id.* at n.19.

Plaintiffs argue that there was a clear causal connection between their initiation of this lawsuit and the defendants' cessation of the integration practice of which they complained. Assuming, arguendo, that plaintiffs can be said to have prevailed to some extent, the Court nonetheless finds that an award would not be just in this case. The action was filed as a class action, but no class was ever certified. Plaintiffs' requests for jury trial, for punitive damages, and to disqualify counsel were denied. Plaintiffs received, at best, only a small part of the relief sought, and have continued to litigate their claims long after they became moot. Due to the fact that substantial and unnecessary fees and costs have been generated by such actions, the Court will decline to exercise its discretion to award attorneys' fees in this case. Nor does the Court find that plaintiffs are entitled to costs herein.

Dated this 4th day of December, 1984.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

No. 82-0145C(3)

Richard A. Hechenberger, et al.,
Plaintiffs,

vs.

Western Electric Co., Inc., etc., et al.,
Defendants.

ORDER

(Filed December 4, 1984)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that plaintiffs' request for attorneys' fees be and the same is denied.

IT IS HEREBY FURTHER ORDERED that defendants' objections to plaintiffs' bill of costs be and the same are sustained.

Dated this 4th day of December, 1984.

/s/ William L. Hungate
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2266

Richard A. Hechenberger,
Appellant,

William V. Wilken; Charles W. Ramsey,
Appellants,

vs.

Western Electric Co., Inc.; Western Electric Plan for Employees' Pensions, Disability Benefits and Death Benefits, now also known in part as Western Electric Sickness and Accident Disability Benefit Plan, Western Electric Co., Inc., Plan Administrator,
Appellees,

Southwestern Bell Telephone Co., Inc., Southwestern Bell Telephone Plan for Employees' Pensions, Disability Benefits and Death Benefits, now also known in part as Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan, Southwestern Bell Telephone Co. Plan Administrator,
Appellees,

vs.

Richard Rousselot, Director, Division of Workers Compensation, State of Missouri,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: June 11, 1984

Filed: August 28, 1984

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge

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ROSS, Circuit Judge.

This appeal arises from an action filed by three employees against their employers, Western Electric Co., Inc., and Southwestern Bell Telephone Co., Inc., and the companies' respective disability benefit plans. The employees challenge a practice followed by the companies in Missouri Workers' Compensation proceedings, of offsetting certain workers' compensation awards with amount paid under the disability benefit plans.[1] The employees also claimed that the Missouri statute which authorized the integration of benefits was preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Due to an intervening change in state law, and the defendants' abandonment of their integration policies, the district court[2] held that the claims were moot and granted the defendants' motions for summary judgment. On appeal the employees challenge the court's ruling on the mootness issue. We believe that the substantive issues in this case are moot, accordingly we affirm the judgment of the district court.

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[1] The practice of offsetting workers' compensation awards by the amounts paid under a benefit plan is commonly referred to as "integration."

[2] The Honorable William C. Hungate, United States District Judge for the Eastern District of Missouri.

Discussion

The employees claimed that the Missouri statute which authorized the integration practice was preempted by ERISA. The state statute provided:

> The employer shall be entitled to credit for wages paid the employee after the injury, and for any sum paid to or for the employee or his dependents on account of the injury except for liability under section 287.140.

MO. ANN. STAT. 287.160(3) (Vernon 1965).[3] The Missouri courts had approved the integration practice. *See Strohmeyer v. Southwestern Bell Telephone Co.*, 396 S.W.2d 1 (Mo. Ct. App. 1965). *See also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516 (1981) (compensation awards allowed to offset pension benefits). While this action was pending in the district court, the State of Missouri amended its statute to provide:

> The employer shall not be entitled to credit for wages or such pay benefits paid to the employee or his dependents on account of the injury or death.

MO. ANN. STAT. 287.160.3 (Vernon Supp. 1984). Accordingly, the state statute no longer authorized the integration/offset practice.

Upon learning of the change in the state statute the defendants abandoned their practice of claiming offsets in workers' compensation proceedings. Each defendant filed affidavits in

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[3] This section was amended in 1981 to provide:

> The employer shall be entitled to credit for wages paid to the employee or his dependents on account of the injury or death if such wages were not earned for work performed by the employee after the injury or death.

This modification is not significant for purposes of this appeal.

the district court stating that they would not claim such offsets against the plaintiffs, nor any other employees with claims pending in workers' compensation proceedings. None of the named plaintiffs had been subjected to the integration practice in a compensation proceeding, *see Wilken v. Southwestern Bell Telephone Co.*, No. 82-0145C(3) slip op. at 2-3 (E.D. Mo. Oct. 17, 1983), nor was there any potential that they, or others, would be subjected to this practice in the future. On this basis the court correctly granted the defendants' motions for summary judgment; the employees' claims were moot.

The normal rule is that when claims of the named plaintiffs are moot before class certification dismissal of the action is required. *See Board of School Commissioners v. Jacobs,* 420 U.S. 128 (1975); *Inmates of the Lincoln Intake and Detention Facility v. Boosalis,* 705 F.2d 1021 (8th Cir. 1983). The employees seek to rely on the "relation back" doctrine to save their claim from mootness. The relation back doctrine provides that where the controversy involving the named plaintiffs becomes moot prior to class certification, the certification can relate back to the filing of the complaint. *See Sosna v. Iowa,* 419 U.S. 393, 402 n.11 (1975). Whether the doctrine should be applied depends upon whether "the issue would evade review." *Id.* Here, there is nothing to prevent an employee who was actually subjected to an offset, prior to the amendment of the state statute, from bringing an action to challenge the former practice.[4] Accordingly, there is nothing to indicate that the issue will "evade review." *See Bradley v. Housing Authority,* 512 F.2d 626, 629 (8th Cir. 1975). We see no reason why the normal rule requiring dismissal should not apply in this case.

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[4] Precisely such an action is currently pending in the United States District Court for the Eastern District of Missouri, and is docketed as *Clemens v. Southwestern Bell Telephone Co.*, No. 84-0756C(3). Class certification has been requested in that case.

Accordingly, the judgment of the district court will be affirmed.[5]

A true copy.

Attest:

CLERK, U. S. Court of Appeals, Eighth Circuit.

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[5] The appellants argue that the case is not moot as they are entitled to attorney's fees and litigation expenses under 29 U.S.C. § 1132 (West Pamphlet 1984) because they successfully prompted the defendants to change their policies. We believe this demand for fees should be presented to the district court in the form of a fee request; it does not save the case from mootness.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

Richard A. Hechenberger, et al.,
Plaintiffs,

vs.

Western Electric Co., Inc., et al.,
Defendants.

MEMORANDUM

(Filed August 22, 1983)

This matter is before the Court on the motion of defendants Western Electric Company, Inc., and the Western Electric Sickness and Accident Disability Benefit Plan (hereinafter collectively referred to as defendant Western Electric) for summary judgment dismissing the second amended complaint against them.

This is a suit arising under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, with alleged ancillary jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The principal defendants are Western Electric Company, Inc., the Western Electric Sickness and Accident Disability Benefit Plan, Southwestern Bell Telephone Company, Inc., and the Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan.

The Western Electric Sickness and Accident Disability Benefit Plan provides, among other things, for employee participants to receive payments on account of physical disability to work by reason of accidental injury arising out of and in the

course of employment by Western Electric. *See* Affidavit of J. E. Twomey, ¶ 3, and § 5 of Exh. 2, the plan, attached thereto. Hechenberger filed a workers' compensation claim under the law of Missouri. At present, this claim is unresolved.

In this action, plaintiffs assert that Western Electric is improperly claiming an offset for the previous payments to plaintiff Hechenberger under the plan that were in excess of legally required workers' compensation healing period benefits. In Hechenberger's case, these excess payments may amount to more than $9,000.00; so, in effect, he would receive no payment for workers' compensation after the offset. This offset is said to violate ERISA. Plaintiff Hechenberger sues to recover the offset amount which he claims as a benefit under the plan.

On June 8, 1983, plaintiff Hechenberger filed a motion to maintain a class action and for certification of the class. Plaintiffs seek to certify all other employees who are participants in defendants' employee benefit plans and who have had amounts received under workers' compensation awards offset by employee benefit plans. Plaintiff Hechenberger is the only named plaintiff who is an employee of defendant Western Electric and participant under its employee benefit plan (plaintiffs' second amended complaint, ¶ 2(a)).

Defendant Western Electric claims that its plan and practice is authorized by the Missouri Workers' Compensation Act, specifically, Mo. Rev. Stat. § 287.160.3, which provides:

> The employer shall be entitled to credit for wages paid to the employee or his dependents on account of the injury or death if such wages were not earned for work performed by the employee after the injury or death.

In further support of its contention, defendant Western Electric cites *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516-17 (1981), approving its plan and practice of offset.

Plaintiffs claim that defendant Western Electric's plan and practice violates ERISA and that, to the extent Mo. Rev. Stat. § 287.160.3 authorizes the practice, it is preempted by ERISA.

Defendant Western Electric now moves for summary judgment against plaintiff Hechenberger's claim individually, and as a purported class member, claiming that it has never received any offset from plaintiff Hechenberger's workers' compensation claim and has no intention to offset any amounts in pending or future cases that are similar to plaintiff Hechenberger's.

In support of its motion, defendant Western Electric filed an affidavit of Michael McGuire. Mr. McGuire represented Western Electric before the Missouri Division of Workers' Compensation on several claims, including plaintiff Hechenberger's. In his affidavit, Mr. McGuire states that plaintiff Hechenberger never received an award from the Workers' Compensation Board. Mr. McGuire further states that, because plaintiff Hechenberger never received such an award, defendant Western Electric never sought an offset for payments made under its employee benefit plan.

Nowhere in Mr. Hechenberger's affidavit, filed in response to defendant Western Electric's motion for summary judgment, does he claim he either received benefits under the workers' compensation statute or was subject to defendant Western Electric's offset.

Thus, plaintiff Hechenberger's claim that defendant Western Electric's plan and practice of offset against workers' compensation awards violates ERISA concerns no present controversy as to him individually.

When claims of the named plaintiffs are moot before class certification under Fed. R. Civ. P. 23(c)(1), dismissal of the action is required because there is no case or controversy between the parties under Article III of the Constitution. *Indianapolis School Commissioner v. Jacobs,* 420 U.S. 128, 129 (1975);

Sosna v. Iowa, 419 U.S. 393, 402 (1975); *Bishop v. Committee of Professional Ethics, etc.*, 686 F.2d 1278, 1283 (8th Cir. 1982); *Bradley v. Housing Authority of Kansas City, Mo.*, 512 F.2d 626, 628 (8th Cir. 1975). In particular, *Sosna* noted that the named plaintiff, throughout the course of the litigation, "must show that the threat of injury in a case...is 'real and immediate; not...hypothetical.' " *Sosna v. Iowa, supra* at 403 (citation omitted).

Plaintiff Hechenberger, in response to defendant Western Electric's motion for summary judgment, claims that, even if plaintiff's claims are moot, summary judgment is improper because other issues remain in the case. Plaintiff Hechenberger claims he is entitled to costs and attorney's fees because, by filing this suit and seeking class certification, he was successful in prompting defendant Western Electric to withdraw its practice of offset. Plaintiff further claims that to grant summary judgment at this state of the proceeding would frustrate uniform national labor policy.

The Court finds that these contentions are without merit. The import of *Sosna* and *Jacobs* requires that summary judgment be granted, prior to class certification, if the named plaintiff's claim is not a matter of present controversy. Plaintiff Hechenberger is not precluded from asserting these claims in the future.

Plaintiff further argues that the doctrine of "relation-back" should preclude the granting of summary judgment. In *Sosna*, the Court noted that, even though a claim is moot prior to class certification, the certification could "relate back" to the filing of the complaint if the circumstances of the particular case required review of the underlying issues. *Sosna v. Iowa, supra* at 402 n.11.

However, in the instant case and in *Bradley, supra*, the issues would not evade review if the "relation-back" doctrine was not applied. In the affidavits of Mr. McGuire and Mr. John E.

Twomey, secretary of the employee benefit committee of Western Electric, both stated that defendant Western Electric would cease implementing the plan and practice of offset to all pending and future cases similar to plaintiff Hechenberger's.

In order to prevail on a motion for summary judgment, the burden is on the moving party to establish beyond controversy that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Roberts v. Browning,* 610 F.2d 528, 531-32 (8th Cir. 1979). This Court is required to view the facts in a light most favorable to the non-moving party and to give that party the benefit of reasonable inferences drawn from the underlying facts. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 153-59 (1970); *Goodman v. Parwatikar,* 570 F.2d 801, 803 (8th Cir. 1978). "Unless the pleadings and supporting documents disclose beyond any doubt the absence of a genuine issue of fact, summary judgment should not be entered." *Evans v. McDonnell Aircraft Corp.,* 395 F.2d 359, 362 (8th Cir. 1968).

There are no genuine issues of material fact regarding plaintiff Hechenberger's individual claim against defendant Western Electric. Because the named plaintiff's claim is not presently in controversy, defendant Western Electric's motion for summary judgment will be granted.

Dated this 22nd day of August, 1983.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

Richard A. Hechenberger, et al.,
Plaintiffs,

vs.

Western Electric Co., Inc., et al.,
Defendants.

ORDER

(Filed August 22, 1983)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the motion of defendant Western Electric Company and defendant Western Electric Sickness and Accident Disability Benefit Plan for summary judgment be and the same is granted.

Dated this 22nd day of August, 1983.

/s/ William L. Hungate
United States District Judge

APPENDIX F

29 U.S.C. § 1001

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

* * *

29 §1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

* * *

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

* * *

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

* * *

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

* * *

29 §1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

Federal Rules of Appellate Procedure (FRAP)

Rule 38.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Eighth Circuit Rules of Appellate Procedure (8th Cir.R.)

Rule 16. Hearing and Rehearing of Case En Banc

(e) Frivolous Petitions; Costs Assessed. If counsel files a frivolous petition for rehearing en banc, counsel shall be deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously in the sum of $250. At the court's order, counsel may be required personally to pay those costs to the opposing party. See 28 U.S.C. § 1927.